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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SPECS USA CORP, a California  
corporation,

No C 10-4250 VRW

ORDER

Plaintiff,

v

SPECS Surface Nano Analysis GmbH,  
a German corporation, SPECS  
Surface Nano Analysis, Inc, a  
Florida corporation and DOES 1-  
20,

Defendants.

\_\_\_\_\_ /

In their motion to dismiss plaintiff's complaint pursuant  
to FRCP 12(b)(3), defendants SPECS Surface Nano Analysis GmbH and  
SPECS Surface Nano Analysis, Inc (collectively "defendants")  
contend that plaintiff seeks both to enforce the parties' alleged

1 agreement and to avoid that agreement's forum-selection clause.  
2 Docs #7 at 6; 16 at 7. In defendants' words, plaintiff should be  
3 estopped from "disputing the existence of provisions of [the  
4 parties'] contract that it dislikes." Doc #16 at 7. Plaintiff, in  
5 opposition, offers only limited argument on this issue and fails to  
6 cite or to address any case law in support of its position. Doc  
7 #15 at 7-8.

8 In doing so, plaintiff attempts to frame its ratification  
9 of the agreement at issue as applying only to "[t]he salient terms  
10 of the Agreement" — which in its view would not include the forum-  
11 selection clause. Plaintiff's complaint, however, alleges that the  
12 parties "ratified the agreement," Doc #1 at 7 ln 10, "entered into  
13 an Agreement," id at 11 ln 6, and "operated under the terms of the  
14 Agreement," id at ln 12-13, without carving out an exception for  
15 the forum-selection clause. "Factual assertions in pleadings and  
16 pretrial orders, unless amended, are considered judicial admissions  
17 conclusively binding on the party who made them," Am Title Ins Co v  
18 Lacelaw Corp, 861 F2d 224, 226 (9th Cir 1988), and "have the effect  
19 of withdrawing a fact from issue and dispensing wholly with the  
20 need for proof of the fact," id at 226; see also Ohkubo v Antara  
21 Biosciences, Inc, 364 Fed Appx 340 (9th Cir 2010) (unpublished).

22 Perhaps surprisingly, defendants have not presented the  
23 court with case law addressing this situation; nor have the parties  
24 taken time fully to develop their respective estoppel positions.  
25 The issues of estoppel and the enforceability of an unsigned forum  
26 selection clause have arisen, however, in the purchase order and  
27 arbitration contexts, among other places. See, for example, Comer  
28 v Micor, Inc, 436 F3d 1098 (9th Cir 2006); Hellenic Investment Fund

1 v Det Norske Veritas, 464 F3d 514 (5th Cir 2006); E I DuPont de  
2 Nemours and Co v Rhone Poulenc Fiber and Resin Intermediates, SAS,  
3 269 F3d 187 (3d Cir 2001); Roberts & Schaefer Co v Merit Contr Inc,  
4 99 F3d 248 (7th Cir 1996); SRS, Inc v Airflex Industrial, Inc, 2008  
5 WL 4792687 (D NJ 2008); Chastain v Union Sec Life Ins Co, 502 F  
6 Supp 2d 1072 (CD Cal 2007); Legacy Wireless Services v Human  
7 Capital, LLC, 314 F Supp 2d 1045 (D Or 2004).

8           These cases suggest that "[e]quitable estoppel precludes  
9 a party from claiming the benefits of a contract while  
10 simultaneously attempting to avoid the burdens that contract  
11 imposes," Comer, 436 F3d at 1101, and direct-benefit estoppel  
12 "involve[s] non-signatories who, during the life of the contract,  
13 have embraced the contract despite their non-signatory status but  
14 then, during litigation, attempt to repudiate [a clause] in the  
15 contract," DuPont, 269 F3d at 200.

16           Before hearing the matter, it would be helpful to the  
17 court to receive guidance from the parties on these issues. On or  
18 before December 8, 2010, plaintiff is ORDERED to file a  
19 supplemental memorandum of not more than ten pages addressing Am  
20 Title Ins Co and its progeny and any theory of estoppel that may  
21 pertain to this case. Defendants may file, if they choose, a  
22 supplemental memorandum of not more than ten pages on or before  
23 December 15, 2010. The parties are reminded to limit their  
24 submissions to the issues discussed herein and should support their  
25 respective positions with citations to appropriate legal authority.

26           The hearing previously scheduled for December 2, 2010 is  
27 HEREBY VACATED and RESCHEDULED for 10AM on December 23, 2010. If  
28 the parties are unable to appear at that time, they may reset the

1 hearing by contacting the court clerk. In the event of further  
2 rescheduling, however, the parties should comply with the above-  
3 described briefing schedule.

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5 IT IS SO ORDERED.

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7 Vaughn R Walker  
8 United States District Chief Judge  
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